

UNITED MALAYAN BANKING CORP BHD

a

v.

TAN KAY HOCK

COURT OF APPEAL, KUALA LUMPUR

b

ZAKARIA YATIM JCA

MAHADEV SHANKAR JCA

VC GEORGE JCA

[CIVIL APPEAL NO: W-03-5-1994]

26 MAY 1997

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CIVIL PROCEDURE: *Appeal - Summary judgment - Whether there was defence on merit - Inconsistencies in statement of claim - Whether case appropriate for summary judgment - Whether learned registrar right in dismissing application under O. 18 r. 19 of Rules of High Court 1980*

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The appellant had filed a claim against the three defendants for loans given to the 1st defendant but which were guaranteed by the 2nd and 3rd defendants. The amount claimed for, in the statement of claim, did not tally with the amount owed as stated in the certificates of indebtedness. There were also no account numbers of the loans in the certificates of indebtedness and the rates of interest varied from what was set out in the statement of claim. The defendants' solicitors requested for documentation to support the loan transactions, because of the discrepancies between the certificates of indebtedness and the statement of claim, but the particulars were not given by the appellant. After the defendants filed in their defence, the appellant applied to have it struck off. The senior assistant registrar dismissed the application and the appellant appealed to the High Court. The judge dismissed it and the appellant appealed to the Court of Appeal.

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Held:

Per Mahadev Shankar JCA:

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[1] In a case where the triable issues arise as a matter of evidence, it would be wrong for the appellate court to interfere with the judge's discretion. When the learned registrar dismissed the appellant's application to strike out the defence, he was exercising a judicial discretion.

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[2] In the light of the infirmities in the statement of claim, it could not be said, that there was no reasonable defence. Therefore, the case would not have been an appropriate one for summary judgment.

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a Obiter dictum

- b* [1] The approach in the evaluation of an application to strike out under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') is different from the approach in evaluating an appeal for summary judgment under O. 14 of the Subordinate Court Rules 1980 ('the SCR'). In the hearing of an appeal under O. 14 of the SCR, it is a rehearing in the appellate court, but under O. 18 r. 19 of the RHC, the appellate court will review the exercise of the judge's discretion.

[Appeal dismissed.]

c [Bahasa Malaysia Translation of Headnotes]

- d PROSEDUR SIVIL: Rayuan - Samada terdapatnya pembelaan ke atas merit - Tak konsisten dalam pernyataan tuntutan - Samada kes wajar untuk penghakiman terus - Samada pendaftar yang bijaksana betul dalam menolak permohonan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980*

- e* Perayu telah memfailkan tuntutan terhadap ketiga-tiga defendan bagi pinjaman yang telah diberikan kepada defendan pertama, dan yang mana telah digerentikan oleh defendan-defendan kedua dan ketiga. Jumlah yang dituntut dalam pernyataan tuntutan tidak selaras dengan jumlah terhutang sepertimana yang dinyatakan dalam perakuan-perakuan keterhutangan. Tidak juga terdapat nombor-nombor akaun berhubung dengan pinjaman tersebut dalam perakuan-perakuan keterhutangan, dan kadar-kadar faedah berubah daripada apa yang telah dibentangkan dalam pernyataan tuntutan. Peguamcara responden, meminta untuk mendapatkan dokumen-dokumen bagi menyokong transaksi pinjaman, disebabkan kesilapan antara perakuan-perakuan keterhutangan dan pernyataan tuntutan, tetapi butir-butir telah tidak diberikan oleh perayu. Selepas defendan-defendan memfailkan pembelaan mereka, perayu telah memohon untuk membatalkannya. Penolong kanan pendaftar telah menolak permohonan tersebut dan perayu telah merayu kepada Mahkamah Tinggi. Hakim telah menolaknya
- f* dan perayu merayu kepada Mahkamah Rayuan.
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Diputuskan:

Oleh Mahadev Shankar HMR:

- h* [1] Dalam sesuatu kes di mana isu-isu yang boleh dibicarakan berbangkit sebagai perkara keterangan, ianya salah bagi Mahkamah Rayuan untuk mencampuri budibicara hakim yang bijaksana. Apabila pendaftar yang bijaksana menolak permohonan bank untuk membatalkan pembelaan, beliau sedang melaksanakan budibicara kehakiman.

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[2] Memandangkan kelemahan-kelemahan pernyataan tuntutan, ianya tidak boleh dinyatakan bahawa tidak terdapat sebarang pembelaan yang wajar. Dengan itu kes tersebut tidak akan merupakan satu kes, yang wajar untuk penghakiman terus. a

Obiter dictum

[1] Pendekatan dalam penilaian permohonan untuk membatalkan di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), adalah berbeza daripada pendekatan dalam menilai sesuatu rayuan untuk penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Dalam perbicaraan rayuan di bawah A. 14 KMR ianya adalah merupakan satu perbicaraan semula dalam Mahkamah Rayuan tetapi di bawah A. 18 k. 19 KMT, Mahkamah Rayuan akan mengaji semula perlaksanaan budibicara hakim tersebut. b
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Case referred to:

United Malayan Banking Corporation Bhd v. Pembinaan KSY Bhd & 2 Ors [1993] 3 CLJ 612 (*aff*) d

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: C23-1917-86] e

For the appellant - Manjit Singh (Deborah Kaur with him); M/s Adnan Sundra & Low

For the respondent - RR Sethu (Law Mei Lin with him); M/s PM Tan, Chan & Partners

JUDGMENT

Mahadev Shankar JCA:

We unanimously dismissed this appeal with costs immediately upon the conclusion of the counsel's submissions. Although YA Dato' VC George retired after the notice of appeal was filed, the reasons of the court now follows. f
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The appellant ('the bank') filed this claim in the High Court to recover moneys lent to the first defendant by its Head Office at Kuala Lumpur (through an account No. 7478) by way of an overdraft, and by way of a Letter of Guarantee, and also to recover moneys lent by its Telok Intan Office (through an account No. 2383) by way of an overdraft and by way of a fixed loan and through account No. 3222 by way of an overdraft. In other words there were three accounts under which there were five separate loan transactions. h
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- a* The bank claimed that these loans were secured by two guarantees executed by the second and third defendants. After the suit was filed the bank pursued the third defendant ('Tan') alone. He filed a defence. The bank filed a summons-in-chambers to the registrar to have the defence struck out under O. 18 r. 19 of the Rules of High Court 1980. The registrar dismissed the application. The bank appealed to the judge. She dismissed the appeal. The bank then appealed to us.

Tan executed a guarantee to the bank on 21 March 1980 ('the first guarantee'). The opening words of the first guarantee read as follows:

- c* IN CONSIDERATION of your agreeing at my/our (joint and several) request to continue/open **AN** account current with and to give credit to Sabak Bernam Oil Mill (1975) Sdn. Berhad (hereinafter called "the Customer(s)) I/We hereby (jointly and severally) agreed to guarantee and/or indemnity you as follows: (Emphasis supplied).
- d* We have emphasised "**AN**" because the particular account to which this guarantee refers was not identified in this document or in the statement of claim. This first guarantee was limited to RM5.3 million with interest at 11% per annum variable at the bank's discretion upon the bank giving prior notice.
- e* On another date which is not stated Tan executed a second guarantee ('the second guarantee'). Both the interest chargeable and the date of this instrument has been left blank. It was limited to RM133,740. In all other respects it was identical in terms to the first guarantee. Once again the account to which this guarantee related was not identified either in the document or the statement of claim.
- f* On 8 March 1984 the bank sent out demand letters for payment of six loans. The first was for an outstanding overdraft for RM2,031,706.14 with interest at 13% per annum on the first RM1.5 million and 14% per annum on the balance. The other five loans were due on various bills of exchange. Interest at 14% per annum was charged on these loans.
- g* The five transactions set out in the amended statement of claim totalling RM6,384,771.82 are for amounts which are different from what is set out in the demand letters. It is not apparent which of the six transactions in the demand letters transactions relate to which accounts set out in the statement of claim. In the prayer to the statement of claim a flat rate of 14% per annum by way of interest is claimed from 31 December 1985 till judgment. No details are given in the statement of claim as to how the bank became entitled to recover such rates of interest from Tan.
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- i*

The guarantees contained a conclusive evidence clause. On 17 September 1990 the bank's branch manager at Telok Intan signed a Certificate of Indebtedness that as at 15 September 1990 the first defendant owed the bank \$4,552,406.81 with further interest at 10% per annum from 16 September 1990 till full settlement. Even if the "\$" sign could be taken to mean "RM" this figure does not tally with the amounts in the statement of claim. *a*
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On 6 October 1990 the bank's Kuala Lumpur manager certified that:

SABAK OIL SDN BHD is indebted to the UNITED MALAYAN BANKING CORPORATION BERHAD in the sum of \$3,771,344.06 as at 15 Sept. 1990 being in respect of Overdraft facility together with further interest thereon at the rate of 10% pa from 16 Sept. 1990 till date of full settlement and the sum of \$1,059,756.23 as at 15 Sept. 1990 being in respect of Bank Guarantee facility together with further interest thereon at 14% pa from 16 Sept. 1990 till date of full settlement. *c*

I, further certify that TAN KAY HOCK being the guarantor of the abovenamed SABAK OIL SDN BHD is indebted to the UNITED MALAYAN BANKING CORPORATION BERHAD in the sum of \$3,771,344.06 as at 15 Sept. 1990 being in respect of Overdraft facility together with further interest thereon at the rate of 10% pa from 16 Sept. 1990 till date of full settlement and the sum of \$1,059,756.23 as at 15 Sept. 1990 being in respect of Bank Guarantee facility together with further interest thereon at 14% pa from 16 Sept. 1990 till date of full settlement. *d*
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The Telok Intan certificate made no reference to Tan. The certificates do not relate the account numbers of these loans to what is stated in the demand letters and the rates of interest vary from what is set out in the statement of claim. Besides taken together the total as at 15 September 1990 is RM8,323,750.87. To be conclusive these certificates, at the very least had to be consistent with the statement of claim. They were not. *f*

These discrepancies were the subject of correspondence between the respective solicitors of Tan and the bank when Tan's solicitors asked for the documentation to support the five transactions listed in the statement of claim. The bank's solicitors declined to supply the particulars requested. *g*

Paragraphs 5 and 6 of the amended statement of claim read as follows (with our emphasis added): *h*

5. By a contract in writing dated the 10th day of March, 1980 ("1st Guarantee") in consideration of the plaintiffs making **an advance** to the 1st defendant the 2nd and 3rd defendants covenanted with the plaintiffs to guarantee the due payment of the same up to the sum of M\$5,300,000 together with interest at the rate of 11% per annum, commission banking charges and costs including *i*

- a* the cost incurred by the plaintiffs in enforcing or seeking to obtain payment of the money thereby guaranteed.

6. By a further contract in writing dated the 17th day of April, 1980 ("2nd Guarantee") in consideration of the plaintiffs making **an advance** to the 1st defendant the 2nd and 3rd defendants covenanted with the plaintiffs to guarantee the due payment of the same up to the limit of M\$133,740 together with interest at the usual rate or rates of the plaintiffs.

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These paragraphs clearly leave the court with the impression that one advance each was made under each of the guarantees whereas all the other material put forward by the bank indicates otherwise.

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For the guidance of practitioners, and with respect to the bank's solicitors, we wish to confirm and highlight the submission of Encik Sethu who appeared as Tan's counsel in this appeal. Applications to strike out under O. 18 r. 19 of the Rules of the High Court and applications for summary judgment under O. 14 call for very different approaches in judicial evaluation. (See *United Malayan Banking Corporation Bhd. v. Pembinaan KSY Bhd. & 2 Ors* [1993] 2 AMR 38, p. 2169 @ 2172, and 2174 where YA Mohamed Dzaidin bin Haji Abdullah, SCJ said:

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- e* The approach to be taken by an appellate court in an O. 14 appeal has been settled. The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was accepted by this court in *Kok Siak Poo v. Perakayan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, following *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 SC P 185, *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 and *European Asian Bank v. Punjab & Sind Bank (No 2) (CA)* [1983] 1 WLR 643; [1983] 2 All ER 508, 516.

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- g* In the present appeal, since the triable issues, as found by learned judge, arose as matter of evidence, following the above principles, it would be wrong for this court to interfere with the learned judge's discretion. Furthermore, upon considering the issues raised in the amended defence, we find ourselves in complete agreement with the conclusions of the learned judge. Accordingly, we hold that this is not an appropriate case for summary judgment.

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The learned registrar was exercising a judicial discretion when she dismissed the bank's application to strike out. With respect we feel that YA Puan Rahmah Hussain covered the ground admirably in her judgment with which we entirely agree. All the relevant principles have been stated there. This defence can be criticised as being somewhat artfully worded but the bank's

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solicitors refusal to supply the documents requested could have contributed to that situation. What cannot be said is that there is no reasonable defence in the light of all the infirmities of the statement of claim which we have spelt out.

Reported by Michele Saw

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